

SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
ONE THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947

June 3, 2009

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RE: *Richard J. Sternberg, M.D. v. Nanticoke Memorial Hospital, et al.*
C.A. No. 07C-10-011(THG)

Dear Counsel:

The Court has before it a Motion to Reargue an Award of Attorneys Fees pursuant to Superior Court Civil Rule 11 and a reminder for me to determine the award of attorneys' fees on a previously granted motion to compel.

RULE 11 REARGUMENT

_____ Fortunately in Delaware, issues concerning Rule 11 sanctions occur rarely. In my 20 years on the bench, the award of Rule 11 sanctions have been extremely rare.¹

On March 18, 2009, I found a Rule 11 sanction to be appropriate and requested that Plaintiff's counsel file an affidavit as to Plaintiff's attorneys' fees. As is my practice when

¹*Speidel v. St. Francis Hosp., Inc.*, 2003 WL 21524694 (Del. Super. July 03, 2003).

Subsequently, by correspondence dated April 7, 2009, Mr. Raphael, on behalf of Plaintiff's position, noted that "defense counsel billed \$11,300 in connection with the Rule 11 motion" while "Plaintiff's counsel billed \$12,273.56 in connection with the Rule 11 motion".

As I have commented earlier, the Courts are open for the resolution of disputes. This business dispute, as is sometimes the case, appears to be driven in part by the feelings of mutual dislike. Perhaps that cannot be avoided, but that is the circumstance in which the parties find themselves. I expect there will be no resolution except by verdict. In making my decision on attorneys' fees, the Rule's direction is to deter comparable conduct by others. Because the Delaware courts are fortunate in rarely having Rule 11 problems, I think the award of \$7,500.00 is a real deterrence. This is to be assessed against the party defendants, and not their attorney, for the reasons noted in my decision of March 18, 2009.

I also note the challenged pleading was withdrawn within two weeks of the expiration of the "safe harbor" provision of Rule 11(c).

I also am of the opinion that the bulk of the work involved in defending this matter was in the Motion to Dismiss. The summary judgment motion built on the Motion to Dismiss as I had determined the Motion to Dismiss was premature.

By my calculations, Plaintiff spent an enormous amount of money on this issue. Perhaps my pedigree as a country lawyer is kicking in, but I cannot find that the amounts of money expended were reasonable. The issues were not so complicated to require layers of lawyers with multiple reviews.

Finally, I am of the opinion that awards for any sanction should be granted cautiously as the Court does not want to create a cottage industry in seeking sanctions because it is profitable. So with this further explanation, the April 29, 2009, decision remains as ordered.

MOTION TO COMPEL

On January 16, 2009, the Court addressed the problem of Plaintiff having to file a Motion to Compel in order to get discovery responses from Defendants. By January 16, 2009, the tardiness of Defendants was cured, but the Court awarded attorneys' fees as it was determined the Motion to Compel was appropriate under all the circumstances. The amount of the award was to be determined later. Counsel correctly noted in the Motion to Reargue discussed above that I had allowed the Motion to Compel attorneys' fees to fall between the cracks.

In determining the reasonable expenses of Plaintiff, I note the following:

- (1) Plaintiff initiated a lawsuit against (a) Nanticoke Memorial Hospital; and (b) fifteen (15) doctors who are members of the hospital's governing boards and/or committees; and (c) as well as staff of the Hospital. Mr. Hackett represents the Defendants.

- (2) On October 24, 2008, Plaintiff served discovery on the fifteen (15) physician defendants.
- (3) No responses were timely filed by the physician defendants. One doctor's response was delivered to Plaintiff on December 1, 2008.
- (4) By letter of December 3, 2008 to Mr. Hackett, Plaintiff requested the overdue discovery be provided immediately.
- (5) By December 30, 2008, the discovery remained overdue for ten (10) of the physician defendants. Plaintiff sent a letter demanding the answers from these physician defendants by January 5, 2009, or a Motion to Compel would be filed. With the weekend and the end of the year holiday, this left Mr. Hackett with four (4) theoretical days and two (2) practical days to respond.
- (6) By January 5, 2009, Defendants had caught up and filed the overdue discovery on all but four (4) defendants.
- (7) The Motion to Compel was filed on January 6, 2009, for presentation on January 16, 2009.
- (8) On January 16, 2009, all discovery was current except for one doctor. A Motion for a Protective Order had been filed as to that physician.

From what I can determine from this file, Plaintiff has four attorneys representing his interest. He is receiving zealous representation.

The hospital and 16 individual defendants are represented by a single attorney; nevertheless, he is required to comply with the rules or seek relief. Not having done so has triggered the sanctions of having to pay the reasonable expenses of Plaintiff to force compliance.

Although Mr. Hackett has not offered it as any excuse, I am aware from the newspaper that he was dealing with his mother's death in early December. While this is not a part of the Court record, I think in judging Mr. Hackett's tardiness, I can look to what one might reasonably expect of a person in his circumstances.

The Court is also mindful of the difficulty in trying to get discovery responses from fifteen (15) doctors. Mr. Hackett noted his difficulty in getting timely responses from his clients.

The Motion to Compel is 3 pages long. It simply recites the operative facts noted above. It was filed on January 6, 2009, and presented on January 16, 2009.

Local counsel billed \$323.50 to review the motion prepared by Pennsylvania counsel, who billed \$1,475.00 for preparing the Motion to Compel. The Motion filed on January 6, 2009, appears to have one hour spent by Philadelphia counsel to prepare the three-page

motion with two letter affidavits. Delaware counsel spent 3/4 of an hour to review it and arrange for its filing with the Court.

Therefore, the time spent is mainly for reviewing, pondering and attending Court on January 16, 2009.

Therefore, Plaintiff seeks \$1,798.50 in attorneys' fees as to this Motion to Compel, a motion that is no different nor more complex than any other normal Motion to Compel, together with \$141.50 in expenses for delivering the pleadings.

On January 16, 2009, when the Motion to Compel was presented, it took minimal time. Other motions and issues took the majority of the time expended that morning. The major issue on January 16, 2009 was argument on the Rule 11 motion.

In Superior Court, there is an expectation that there will be communication between counsel to resolve discovery problems. Although Plaintiff had every right to file the Motion to Compel, I note that by the time it was filed, the majority of the tardy discovery had been filed. Discovery responses were filed in a steady stream as they came back from the physician defendants.

At least in this county, the Court has been reluctant to turn motions to compel into money matters because if one can make money on a motion to compel, more will be filed and there will be less flexibility and cooperation between counsel. The "going rate" in Sussex County as to attorneys' fees on a Motion to Compel when compliance has occurred before the formal presentation of the motion on a motions calendar has been \$250.00. I would hope that but for the other issues on the calendar, this motion would have been withdrawn.

Therefore, in considering the above factors, the Court awards Plaintiff's counsel \$250.00 in attorneys' fees and \$141.50 in expenses.

Yours very truly,

/s/ T. Henley Graves

T. Henley Graves

baj

cc: Prothonotary